

CAUSE NO. 22-CV-0675

| | | |
|---|----------|--|
| SALT & PEPPER RESTAURANTS, INC., | § | IN THE DISTRICT COURT |
| Plaintiff | § | |
| v. | § | GALVESTON COUNTY, TEXAS |
| TIGHT ENDS SPORTS BAR & GRILL, LLC | § | |
| and TIMOTHY DUNGAN, | § | |
| Defendants | § | 56th JUDICIAL DISTRICT |

RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Tight Ends Sports Bar & Grill, LLC files this Response to Plaintiff's Motion for Partial Summary Judgment.

SUMMARY

Salt & Pepper has moved for a partial summary judgment on its own claim against one defendant, Tight Ends. It has not sought summary judgment on its claim against the other defendant, Timothy Dungan, or on the defendants' affirmative defenses or counterclaims. Salt & Pepper's motion, however, does not address factual disputes concerning whether all payments have been applied and whether Salt & Pepper failed to timely provide Tight Ends with a breakdown of additional rent due as provided in the contract. The facts issues are addressed in this motion. As a result, Salt & Pepper's motion cannot be granted.

EXHIBITS

Tight Ends submits the following summary judgment evidence, which is attached hereto and incorporated herein by reference for all purposes:

Exhibit A - Declaration of Timothy Dungan (Representative of Tight Ends).

FACTS

The parties agree that Salt & Pepper and Tight Ends executed a commercial lease for the premises at 2502 Gulf Freeway in League City, Texas. Tight Ends does not dispute that it has not

paid all amounts stated in the lease. Tight Ends does contend that it paid one more monthly payment than is stated in the Salt & Pepper damage calculation and the Lakhani declaration – the June 2020 payment. *See Exhibit A.* Also, Salt & Pepper never provided a breakdown of additional rent due as required by the lease. *Id.*

ARGUMENT AND AUTHORITIES

The Court may not grant a motion for traditional summary judgment where a genuine issue of material fact exists. In this case, although there is no dispute that an agreement exists, there are disputes about material facts which prevent a summary judgment from being granted on Salt & Pepper's claims.

First, the exhibits in Salt & Pepper's motion fails to give credit for the June, 2020 rent payment of \$32,000 made by Tight Ends. *See Salt & Pepper's Exhibit A and Tight Ends' Exhibit A.* There is therefore a factual dispute about the amount of base rent due.

Second, Salt & Pepper's damage calculations provided in its exhibits include triple net rents (or "additional rent due" as defined in the lease) in the amount of \$133,970.50; however, as stated in Tight Ends' exhibit, Salt & Pepper never provided a breakdown of additional rent as required by the lease. *See Salt & Pepper's Exhibit A and Tight Ends' Exhibit A.* As provided in Paragraph 3.03 of the lease:

"Not later than one hundred (120) days following the close of each calendar year, Landlord shall provide Tenant an accounting showing in reasonable detail all computations of additional rent due pursuant to Sections 4.04(c) and 6.02. If the total Monthly Tax and Insurance Payments for the calendar year exceed the amount exceed (sic) Landlord's tax and insurance cost under Section 4.04(c) and 6.02, Landlord shall apply the excess to the next payment of Basic Rent or additional rent due under this Lease or refund the excess to Tenant."

Salt & Pepper never provided an accounting to Tight Ends despite requests from Tight Ends to do so. *See Tight Ends' Exhibit A.* A fact issue therefore exists about the amount of Additional Rent due under the Lease, which means that a further dispute exists about Basic Rent

due as provided in this paragraph of the lease.

Third, Salt & Pepper has asked that the Court grant its motion that attorney's fees are due pursuant to Section 38.001 of the Civil Practice & Remedies Code. This section requires proof that a demand be made, and that the respondent did not pay all amounts due within 30 days of demand. There is no proof in Salt & Pepper's motion of demand being made.

Finally, Paragraph 15.19 provides that Tight Ends would tender a security deposit upon the execution of the lease, but Salt & Pepper's exhibits do not evidence the application of the security deposit to the amounts claimed due.

PRAYER

Salt & Pepper has not moved for summary judgment on Defendants' affirmative defenses or counterclaims, and because fact issues exist about Salt & Pepper's claims, Tight Ends asks that the Court deny Salt & Pepper's partial motion for summary judgment on its own claims, and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

John Henry & Associates, PLLC

/s/ John P. Henry

John P. Henry

State Bar No. 24055655

407 West Liberty Avenue

Round Rock, Texas 78664

(512) 981-7301

jhenry@jhenrylaw.com

ATTORNEYS FOR TIGHT ENDS

CAUSE NO. 22-CV-0675

| | | |
|---|---|--|
| SALT & PEPPER RESTAURANTS, INC., Plaintiff | § | IN THE DISTRICT COURT |
| | § | |
| | § | |
| | § | GALVESTON COUNTY, TEXAS |
| | § | |
| | § | |
| TIGHT ENDS SPORTS BAR & GRILL, LLC and TIMOTHY DUNGAN, Defendants | § | |
| | § | |
| | § | 56th JUDICIAL DISTRICT |

DECLARATION OF TIMOTHY DUNGAN

Pursuant to Section 132.001 of the Texas Civil Practice and Remedies Code, I, Timothy Dungan, declare as follows:

1. My name is Timothy Dungan. I am over 18 years old, and I am fully competent to make this declaration. Each statement of fact contained herein is within my personal knowledge and is true and correct.
2. I am the managing member of Tight Ends Sports Bar & Grill, LLC, a defendant in this case. This declaration is submitted in support of Tight Ends' response to Salt & Pepper's motion for partial summary judgment.
3. Tight Ends made a payment of \$32,000.00 in June 2020 that is not reflected on the damage calculation provided by Salt & Pepper. This payment is not applied to any other amount due on the spreadsheet.
4. Tight Ends did not take any equipment which belonged to Salt & Pepper when it vacated the premises.
5. The amount of rent and additional rent claimed due by Salt & Pepper is incorrect. It does not reflect the June 2020 payment that Tight Ends made.
6. Further, Salt & Pepper never provided an accounting to Tight Ends despite requests from Tight Ends to do so.

7. My name is Timothy Dungan. My date of birth is May 8, 1968, and my address is 1603 Wildfire Lane, Frisco, TX 75033. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Dallas County, Texas, on the 28th day of November 2022.



Timothy Dungan

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Civil Procedure on the parties listed below on this 28th day of November, 2022.

/s/ John P. Henry
John P. Henry

Preston Kamin
Gray Reed
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
ATTORNEYS FOR PLAINTIFF
VIA ELECTRONIC SERVICE

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

John Henry on behalf of John Henry
 Bar No. 24055655
 jhenry@jhenrylaw.com
 Envelope ID: 70500095
 Status as of 11/29/2022 5:03 AM CST

Associated Case Party: Salt & Pepper Restaurants, Inc.

| Name | BarNumber | Email | TimestampSubmitted | Status |
|-----------------|-----------|-----------------------|-----------------------|--------|
| Preston TKamin | | pkamin@grayreed.com | 11/28/2022 5:25:38 PM | SENT |
| Tyler J.McGuire | | tmcguire@grayreed.com | 11/28/2022 5:25:38 PM | SENT |
| Justin R.Cowan | | jcowan@grayreed.com | 11/28/2022 5:25:38 PM | SENT |

Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|-------------|-----------|--------------------|-----------------------|--------|
| Jackie Kish | | jkish@grayreed.com | 11/28/2022 5:25:38 PM | SENT |

Associated Case Party: Tight Ends Sports Bar & Grill, LLC

| Name | BarNumber | Email | TimestampSubmitted | Status |
|------------|-----------|----------------------|-----------------------|--------|
| John Henry | | jhenry@jhenrylaw.com | 11/28/2022 5:25:38 PM | SENT |